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87-952

Supreme Court, U.S.
FILED
NOV 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term. I987

WILLIAM R. VANDERWALL, Petitioner

v.

CONSTANCE HORNER, et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

APPENDICES

****

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November 6, I987

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November 6, 1987

APPENDIX

(OPINIONS AND JUDGMENTS)

A LOUISIANA STATE CIVIL SERVICE COMMISSION (APPEAL NO. 4278) OPINION, DATED 10-7-85

B

C

D UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA (NO. 86-525, SECTION "E")
- ORDER AND REASONS, 5-23-86
- ORDER AND REASONS, 8-14-86
- ORDER AND REASONS, 8-18-86

E UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT (86-3617)
- DISMISSAL, 7-9-87
- **PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING, 7-22-87**
- DENIAL OF PETITION FOR PANEL REHEARING, 8-10-87

F STATE CIVIL SERVICE DOCUMENT DATED 8-1-80 AND 4-7-81

APPENDIX A

: :

. . . . . OPINION . . . . . .

: :

. . . . DATED: October 7, 1985 . . . .
. . . . FILED: October 7, 1985 . . . .

: :

IN RE:
Appeal of William R. Vanderwall
(Department of State Civil Service)

STATE OF LOUISIANA
CIVIL SERVICE COMMISSION
DOCKET NO. 4278

STATEMENT OF THE APPEAL/REQUEST FOR INVESTIGATION

Appellant/complainant was employed by the Department of Health and Human Resources as a Planning Analyst IV in the Office of Health Services and Environmental Quality and was serving with permanent status. Mr. Vanderwall retired from State service effective August 31, 1984.

On January 10, 1984, Mr. Vanderwall, in proper person, filed a

request for appeal, wherein he complains of a decision dated December 13, 1983, of the Director of the Department of State Civil Service, which affirmed Mr. Vanderwall's allocation to the class of Planning Analyst IV. In the request for appeal, Mr. Vanderwall also asks for an investigation. Mr. Vanderwall alleges that there are widespread discriminatory and unfair practices in the Department of Health and Human Resources and in the Department of State Civil Service, hereinafter referred to as DHHR and DCS, respectively. Mr. Vanderwall alleges that DCS's attitude is negligent because it considers bad management at DHHR beyond its concern. Mr. Vanderwall charges that DCS's decision was discriminatory because it was not made independently of the decisions of his

superiors at DHHR. Mr. Vanderwall alleges that his position does not fit into the Planning Analyst series bcause his job cannot evolve from or function within the Planning Analyst series; that it requires "a long term, high level and highly varied background with which to comprehensively grasp and innovatively cope with major public health and related problems;" because it requires and is burdened by permanent supervisory responsibilities; because it requires utilization of Public Health Physicians; because it is more congruent with Research and Development practiced by the Federal government and the private sector; and because it entails the creation of health care plans rather than the analysis of the plans developed by others. Mr. Vanderwall alleges that

plaintiff's complaint with motions to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), claiming that the federal court lacks subject matter jurisdiction of this action, and that, in any event, the complaint fails to state a cause of action. After a careful review of the record in this case, I find that the defendants' motions must be GRANTED.

FACTS

The plaintiff is a former employee of the Louisiana Department of Health and Human Resources (DHHR). During his tenure at DHHR, he served as Chief of the Section for Medical/Public Health Social Work for the State of Louisiana, and served as Louisiana's Public Health Program Developer. The defendants include Ms. Constance Horner (the Director of the United States Office

of Personnel Management), Mr. James Smith (the Chairman of Louisiana's Civil Service Commission), Mr. Joseph Kimbrell (the Deputy Assistant Secretary of DHHR), and Mr. Herb Sumrall (the Director of the Louisiana Department of Civil Service), among others. Of particular concern are Mr. Smith and Mr. Kimbrell, whose motions are at bench.

Plaintiff represents himself, and in a slightly murky complaint, he alleges that the defendants conspired to violate the Louisiana State Merit Personnel System and its federal counterpart by passing him over for certain promotions and by demoting him. He alleges, pursuant to 42 U.S.C. §1983, that the defendants' behavior denied him his due process interest in his

employment. He suggests that the conspiracy to evade the Merit Personnel System began in 1980, and extended to early 1982, though he did not discover it until hearings before the State Civil Service Commission on February 5, 1985. This discovery led him to file the present action on February 4, 1986, even though two lawsuits based on the same set of facts are presently pending before the State Courts on appeal from the State Civil Service Commission.

In response to the plaintiff's complaint, two of the defendants, Mr. Kimbrell and Mr. Smith, move the court to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for lack of subject matter jurisdiction and for failure to state a claim. The defendants base their motions on a

variety of legal theories. They maintain that the plaintiff's suit is barred by the Eleventh Amendment's restriction of the Federal Courts' jurisdiction, that the State Civil Service Commission and State Courts have the sole subject matter jurisdiction of the plaintiff's cause of action, that the suit is barred under principles of res judicata, that the plaintiff has failed to state a claim upon which relief can be granted, that the plaintiff's claim is prescribed, and that the present action must be stayed pending the outcome of the litigation in the State Courts. I will address each of these arguments in turn, construing the complaint in favor of the plaintiff and taking its allegations to be true. 5 C. Wright & A. Miller, Federal

Practice and Procedure, §1357.

DISCUSSION

1. The Eleventh Amendment

The defendants, who are both employees of the state, argue that the plaintiff's suit must be barred according to the Eleventh Amendment principles stated in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347 (1974). Edelman forbids relief that is equivalent to an award of money damages for past injuries to be paid directly from the state fisc. American Civil Liberties U. of Miss. v. Finch, 638 F.2d 1336, 1341 (5 Cir. 1981). This principle applies to state officials and agencies when a suit against them will be paid from the state fisc, rather than by them personally. Finch, supra, at 1340-1341; Karpovs v. State of Miss.,

664 F.2d 640, 644 (5 Cir. 1981). However, it has long been the law that the Eleventh Amendment will not bar a suit against an individual state official for his personal wrongdoing (or constitutional violations) while in office, unless that suit is "in essence one for the recovery of money from the state," with the state paying the bill for the defendant's wrongdoing. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, at 350 (1945); Finch, id.; Karpovs, id. In essence then, the plaintiff's suit will be barred by the Eleventh Amendment if any damages he could recover will be paid out of the State treasury.

In this case the State of Louisiana will not be responsible for payment of any damages to which the plaintiff might

be entitled. The plaintiff accuses the various defendants of conspiring to commit a series of intentional constitutional torts on him. Such torts are explicitly excluded from the State of Louisiana's statutory indemnification of its employees by Louisiana Revised Statute 13:5108.1. Thus, the state fisc is in no way jeopardized by the present litigation, and the plaintiff's cause of action is not barred by the Eleventh Amendment. See Karpovs, id.; and see Finch, id.

2. Subject Matter Jurisdiction

Defendant Kimbrell argues that the matters addressed in the plaintiff's complaint are solely within the subject matter jurisdiction of the Louisiana Civil Service Commission, and notes that cases like Bishop v. Wood, 426 U.S. 341,

96 S.Ct. 2074 (1976), and Carbonell v. La. Dept. of Health & Human Resources, 772 F.2d 185 (5 Cir. 1985), imply that the federal courts are not the proper fora to review personnel decisions made by state agencies, or claims previously made in state fora. Bishop, supra, at 349, 2080; Carbonell, at 188. He argues that the plaintiff's complaint must therefore be dismissed.

I am quite willing to agree with the defendant that the federal courts have no business reviewing the personnel decisions of state agencies, so long as no new allegations of constitutional violations are present in the prospective plaintiff's complaint. But surely the defendant does not mean to suggest that when, as here, the plaintiff alleges for the first time

that his due process rights have been violated, the federal courts should refuse to take jurisdiction of the case. Indeed, federal courts take jurisdiction of such cases every day. See, e.g., Cleveland Bd. of Educ. v. Loudermill, ___U.S.___, 105 S.Ct. 1487 (1985), and cases cited therein. So what the defendant must mean by this motion is either that the plaintiff has failed to state a cause of action upon which relief can be granted (the situation in Bishop and Loudermill), or that the federal court should stay any action while related actions are prosecuted by the plaintiff in the state court. I will consider each of these possibilities below, but I note here that I do have subject matter jurisdiction of this case because the

complaint presents a federal question on its face, and this question was not previously decided in the plaintiff's state causes of action.

3. Res Judicata

Defendant Kimbrell also argues that the plaintiff's suit must be dismissed because the Louisiana State Civil Service Commission has heard the plaintiff's complaints twice previously, and the results of those hearings (now pending judicial confirmation in the state courts) are res judicata here. The defendant argues, in effect, that the plaintiff's attempt to make his federal claims in this lawsuit is an impermissible attempt to split his claim, and that any claim now made is barred by the prior judgment of the State Civil Service Commission.

This issue is governed by 28 U.S.C. §1738, which provides in relevant part:

> (t)he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . .

This section has been held to require federal courts to give the same preclusive effect to state court judgments (and quasi-judicial administrative decisions) that those judgments emerged. Kremer v. Chemical Const. Corp., 456 U.S. 461, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982). However, for this section to have effect with regard to administrative decisions, that are not quasi-judicial, there must be a state court judgment reviewing the

administrative decision in order to fully satisfy due process. Kremer, supra, at 1397-8; King v. City of Pagedale, 573 F.Suppl 309, at 313 (E.D. Missouri) ("<a> state administrative proceeding is not sufficient to support preclusion standing alone, but preclusion does arise if the administrative decision is affirmed on judicial review").

In the case at bench, there has been no state judicial review of the State Civil Service Commission's decision regarding the plaintiff, and I cannot tell from the materials before me whether that decision was quasi-judicial or not. But state judicial review is now pending. So, to be safe, I hold that when the state courts of Louisiana pass on the Civil Service Commission's

determination, their judgment will be given full faith and credit under 28 U.S.C. §1738, and will have preclusive effect here, if that judgment satisfies the Louisiana requirements for res judicata. But to treat the judgment of the Civil Service Commission as res judicata now would be premature.

4. Prescription

Defendant Smith maintains that the plaintiff's action is prescribed. He correctly points out that the time for filing a federal civil rights claim is governed by the local statute of limitations for personal injury actions. Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938, 1949 (1985). In Louisiana, the local statute provides for a limitations period of one year. LSA--C.C. art. 3492. Defendant Smith alleges that the

plaintiff retired from DHHR in 1984 (the last possible date on which the defendant could have infringed on the plaintiff's rights), and that the present complaint was not filed until 1986, two years later. This period exceeds that allowed by Louisiana Civil Code Article 3492, and the defendant urges that the plaintiff's action be dismissed.

Plaintiff replies to this argument by alleging that he only became aware that the defendants were conspiring to deprive him of his rights after a hearing before the Civil Service Commission on February 5, 1985. I note that I must take this allegation to be true for the purposes of deciding the defendants' motions. 5 C. Wright & A. Miller, Federal Practice and Procedure,

§1357. And, taking this allegation to be true, plaintiff's complaint would be timely filed on February 4, 1986 (the date it was in fact filed), that date being just under one year after he became aware that a conspiracy to violate his rights existed. See Orgeron v. Mine Safety Appliances Co., 6FSupp. 364, 367 (E.D. La. 1985) (the prescriptive period begins to run when the plaintiff has either actual or constructive knowledge of the tort committed against him). So, as to the conspiracy to violate the plaintiff's rights, the "plaintiff's complaint is timely because he had no knowledge such a conspiracy existed until February 5, 1985.[1]

The same is not true of the substantive allegations in the

in the plaintiff's complaint, however. As to the substantive claim that his constitutional rights have been violated, the plaintiff had ample constructive knowledge or notice of such violation, if any, when he knew that the defendants were not complying with the state guidelines at the time they made the promotions complained of. This is so because constructive notice of tort is deemed to be "whatever notice is enough to excite attention and put the

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[1] Of course, plaintiff's suit for conspiracy can only be maintained if a substantive violation of his federal constitutional rights occurred or could occur (i.e. a person can't conspire to commit a violation unless the violation can occur--one can't be liable for agreeing to do what is permissible). Because I rule below (§5) that no violation of the plaintiff's rights has occurred or could occur on the facts stated in his complaint, I also dismiss the plaintiff's allegation of conspiracy.

owner on his guard and call for inquiry" and "is tantamount to knowledge or notice of everything to which inquiry may lead" in Louisiana. Orgeron, supra at 367, quoting Cartwright v. Chrysler Corporation, 232 So.2d 285, at 287, 255 La. 597 (1970). Surely the defendants' failure to comply with the state guidelines when making promotions should have been enough to put the plaintiff on notice that whatever federal right he had in his job was being threatened as well, and the plaintiff should have immediately made an inquiry to find out whether or not those rights had been violated. But he failed to do so, even though he filed two different complaints with the State Civil Service commission, until more than two years after those rights were violated. For this reason,

the plaintiff's complaint that his substantive federal constitutional rights were violated must be dismissed.

5. Failure to State a Claim

The plaintiff complains that the defendants conspired to deny him due process of law by demoting him and by passing him over when making promotions. He also suggests that he has been denied equal protection of the law because the State of Louisiana has supplied attorneys to the defendants but not to him. (Plaintiff's supplemental memorandum in reply to motions to dismiss, p.6). Under the facts stated by the plaintiff, neither of these theories is viable.

The State is constitutionally required to appoint an attorney for a litigant only when he faces criminal

charges. See Mason v. State of Arizona 504 F.2d 1345, at 1351 (9 Cir. 1974), cert. denied 420 U.S. 936. This is so because the right derives from the Sixt Amendment right to counsel rather than from the constitutional guarantee of equal protection under the laws. Id. Any other appointment of counsel at state expense is within the discretion of the state, and it is perfectly prope that a state should appoint counsel for its political subdivisions (as Louisian has done by LSA--R.S. 13:5108.0) provided the appointment has a rational basis or connection with a valid state interest. Id., at 1354. In the case a bench, the state's decision to appoint its own "in-house" counsel (i.e. the attorney general) is perfectly rational and serves the state's fiscal

interest--it saves the state the expense of hiring outside legal help. The state's decision not to supply the plaintiff with a lawyer is equally rational--it too saves the state money. Moreover, this decision has not, apparently, prejudiced the plaintiff's vindication of his rights, as evidenced by this, his third lawsuit. Plaintiff's claim that his right to equal protection has been violated by the state's refusal to appoint him a lawyer is therefore dismissed.

Plaintiff's claim that his federal constitutional rights in his employment were violated depends on his having a property right on his job. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 2708-9 (1972). If he did have such a right, the state could not

deprive him of it (by demoting him) without due process.[2] Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 735-736 (1975). And the plaintiff's right in his employment, if any, must have been created by state law, as such rights do not derive from the Constitution itself Cleveland Bd. of Educ. v. Loudermill, ___U.S.___, 105 S. Ct. 1487, 1491

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[2] I note that failing to promote the plaintiff would not amount to a due process violation in this case because the state would not have taken anything from the plaintiff without due process, it would only have failed to give him something. In other words, the plaintiff could have no property interest in the job to which he wished to be promoted (that interest was a mer expectancy), and so, could not be deprived of any due process right as to it. See Wells v. Doland, 711 F.2d 670, at 675 (5 Cir. 1983). I also note that the plaintiff was not deprived of any liberty interest here--nothing in the state's failure to promote him amounted to a constitutionally impermissible stigmatization. Wells, supra, at 676.

1985.

The Louisiana Constitution creates a property interest in public employment at Article 10. Article 10 provides that state employees shall be removed from their jobs only for cause, and provides for quasi-judicial procedures to ensure that employees of the state are not removed from their jobs unfairly, and to ensure that none of them are unfairly treated with regard to promotion and demotion. LSA-Const. Art. 10, §§5, 8, 10. Clearly, this is enough to create a property right in employment with the state, as it creates a definable and defensible interest in continued employment. Loudermill, supra, at 1493-1494. And, having found a right, the question for the court becomes whether or not the state provided the

plaintiff with a constitutionally adequate opportunity to challenge its actions before depriving the plaintiff of his property interest. Loudermill, supra, at 1493.

Apparently, the state did provide the plaintiff with such an opportunity. From 1978 to the present, the plaintiff has been challenging the employment procedures of DHHR before the Civil Service Commission, and presently has two appeals from the Commission pending in the state courts. See Plaintiff's Complaint, at p. 19. I find that as a matter of law, these procedures are adequate to protect any interest the plaintiff had in preventing the state from demoting him or failing to promote him. So, when the plaintiff was deprived of a property interest in his

employment, no constitutional violation occurred, because the plaintiff was given constitutionally adequate means to challenge that deprivation. Loudermill, supra, at 1493-1494. That is, although the plaintiff may have been deprived of a right or interest, due process has been satisfied, which is all that the Constitution requires. Accordingly, even if the plaintiff's allegation of constitutional deprivation were timely (see §4 above), the facts he alleges fail to state a cause of action. Levitt v. University of Texas at El Paso, 759 F.2d 1224, 1232 (5 Cir. 1985).

In closing, I note that even if the plaintiff had stated a cause of action in this case, the proper procedure would be to abstain from exercising jurisdiction, and wait for the

resolution of the state proceedings. The two state actions now being pursued by the plaintiff may well decide questions regarding the state regulatory scheme for state employment (in addition to a number of factual and other legal issues) which would be relevant here. To intervene now would be to invite unnecessary conflict with the state tribunal, and this I would decline to do even if the plaintiff had stated a cause of action. Stephens v. Bowie County, Tex., 724 F.2d 434, 435 (5 Cir. 1984); C. Wright & A. Miller, Federal Practice and Procedure, §4247.

CONCLUSION

The defendants' motion must be granted.

New Orleans, Louisiana, this 23 day of May, 1986.

_____

UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
AUGUST 13, 1986
LIVAUDAIS, J.

WILLIAM R. VANDERWALL	CIVIL ACTION
VERSUS	NO. 86-0525
CONSTANCE HORNER, ET AL	SECTION "E"(6)

* * * *

On August 13, 1986, the defendants, Herbert L. Sumrall and Frank Reitzel, moved to dismiss the plaintiff's complaint against them in the above-entitled matter. Now, after a review of the material submitted by the parties, and the oral argument of the plaintiff, I find that the defendants' motions must be GRANTED.

REASONS

The defendants Herbert Sumrall and Frank Reitzel both stand in the same relationship to the plaintiff as those defendants previously dismissed by my order of May 23, 1986. Accordingly, their motion to dismiss is GRANTED for the reasons given in that order.

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY August 14, 1986

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WILLIAM R. VANDERWALL	CIVIL ACTION
VERSUS	NO. 86-525
MS. CONSTANCE HORNER, ET AL	SECTION E/6

J U D G M E N T

Considering this court's order of August 13, 1986, dismissing plaintiff's suit as to defendants Frank Reitzel and Herbert L. Sumrall and considering this court's order of May 23, 1986, cismissing the remaining named defendants;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants, Ms. Constance Horner, in her official capacity as Director, United States Office of Personnel

Management, James R. Smith, in his official capacity as Chairman, Louisiana State Civil Service Commission, Joseph Kimbrell, in his official capacity as the Deputy Assistant Secretary (and delegated appointing authority), Louisiana Department of Health and Human Resources, Office of Health Services and Environmental Quality (now Office of Preventive and Public Health Services), Frank Reitzel and Herbert L. Sumrall, and against plaintiff, William R. Vanderwall, dismissing said plaintiff's suit at his cost.

New Orleans, Louisiana, this 15 day of August, 1986.

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY Aug. 18, 1986

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-3617

WILLIAM R. VANDERWALL,
Plaintiff-Appellant,

versus

CONSTANCE HORNER, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(CA-86-525-E)

(July 9, 1987)

Before REAVLEY, JOHNSON, and DAVIS,

Circuit Judges.

PER CURIAM:*

Plaintiff William R. Vanderwall appeals from the district court's judgment dismissing his action. We dismiss the appeal for lack of jurisdiction.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

A.

In his complaint against state and federal defendants, plaintiff William R. Vanderwall alleges that he was once an employee of Louisiana state. According to the complaint, various alleged wrongdoing by defendants caused Vanderwall to be passed over for a promotion and caused him to be demoted. The complaint prays for extensive declaratory, injunctive, and damages relief to redress his injury. The district court rendered a judgment dismissing Vanderwall's action. Vanderwall appeals.

B.

On appeal, Vanderwall expressly abandons his request for relief. By way of relief, he now seeks "only the opportunity to remain in the Federal

District Court so as to 'give evidence'" generally about various practices of the defendants. This change in Vanderwall's requested relief implicates the constitutional standing doctrine.[1] Because the issue goes to jurisdiction,[2], we raise it on our own

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[1]The standing inquiry examines the plaintiff's standing at the commencement of litigation. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209 (1980); Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). This Court is the first court in this litigation to be presented with Vanderwall's newly requested relief. In that sense, the litigation is newly commenced.

The case might also be analyzed in terms of the mootness doctrine. The mootness inquiry examines whether the plaintiff's standing at the commencement of litigation has persisted throughout the litigation. Geraghty, 445 U.S. at 397, 100 S.Ct. at 1209. The label, standing or mootness, is unimportant in this case because the two doctrines are equals in their constitutional dimension, and the constitutional minimum is the issue in this appeal. See id. 445 U.S. at 395-97, 100 S.Ct. at 1208-09.

motion.[3]

In order to have constitutional standing, a "plaintiff must allege (1) personal injury (2) fairly traceable to the defendant's allegedly unlawful conduct and (3) likely to be redressed by the requested relief."[4] We may assume for purposes of analysis that Vanderwall's allegations establish the first two elements of the constitutional standing doctrine. The third element is now absent, however. Vanderwall's newly requested relief--an opportunity to present evidence generally--will not

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[2]Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37, 96 S.Ct. 1917, 1924 (1975).

[3]Orr v. Orr, 440 U.S. 268, 271, 99 S.Ct. 1102, 1107 (1979).

[4]Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984).

redress his alleged personal injury of demotion and loss of promotion.

We appreciate that Vanderwall is frustrated by and disagrees with various practices of the defendants. His newly requested relief--an opportunity to give evidence generally--might ease his frustration. The Supreme Court has made it clear, however, that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not a sufficient personal injury for constitutional standing purposes.[5] In other words, under this analysis, the first element of the constitutional standing doctrine

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[5] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485, 102 S.Ct. 752, 765 (1982).

is missing.

C.

Without jurisdiction, we cannot proceed. The appeal is therefore

DISMISSED.

* * * * * * * * *

NO. 86-3617

* * * * * * * * * *

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

* * * * * * * * * * * * * * * * *

WILLIAM R. VANDERWALL,
Plaintiff-Appellant

VERSUS

CONSTANCE HORNER, ET AL
Defendant-Appellee

* * * * * * * * * * * * * * * * * *

On Appeal from the United States

District Court for the Eastern District

of Louisiana, New Orleans Division

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PETITION FOR PANEL HEARING

* * * * * * * * * * * * * * * * * *

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IN PROPER PERSON--APPELLANT

INTRODUCTION TO THE PETITION FOR PANEL REHEARING

This Petition for Panel Rehearing of its decision of July 9, 1987, presents facts as to "personal stakes" and clarifications of law 42 USC 1983 so as to establish the plaintiff/ appellant's constitutional standing and the Art. III Federal Court's constitutional jurisdiction as well as to bring (for the first time in federal litigation as explained later) to the panel's attention of "a precedent-setting error of exceptional public importance) worthy of, but presumably not necessary, a Suggestion for Rehearing En Banc. (An apology aforehand is given for the length of this response and the following heavy

use of underlines.)

Before anything, this non-lawyer plaintiff/appellant appreciates this court's calling to his attention of his naive but well-intended statement to no longer seek monetary damages of presumably one dollar to four million dollars. The statement, which was made to highlight his priorities, was also rooted in his perception of a realistic legal Catch-22 bind, as will be seen.

Also quickly in passing, it is suggested that as contained in his brief, dated October 17, 1986, the plaintiff's prayer for relief to the court that, in accordance with 42 USL 1981, namely the right to give evidence, "this case be remanded for the purpose of requiring the District Court to make adequate findings of fact and

conclusions of law, namely declarative and injunctive judgments which are of no monetary gain to the appellant" is, especially with regard to 42 USL 1983, a sufficient request for the constitutional redress of his personal injuries with which to provide him with constitutional standing and an Art. III Federal Court with constitutional jurisdiction so as to hear, at least, the merits of this case. Fortunately, however, there exists more specific and concrete, indeed monetary, "personal stakes" with which to argue as follows:

PERSONAL STAKES

First, though not foremost of all, the plaintiff still has a personal stake and "live" interest in the potential monetary relief from the outcome of continuing litigation in two Louisiana

State Courts: 1) Louisiana Supreme Court, 87-C-1284 upon a Writ of Certiorari-Brief (copy attached) filed on June 4, 1987, as a result of the Louisiana Court of Appeals, First Circuit's denial of the plaintiff/appellant's Request for Rehearing (copy attached) of its decision* (despite its own "manifest error") to affirm the Louisiana State Civil Service Commission's OPINION (of October 7, 1985) of the whistleblower/appellant's own State Civil Service Appeals (commenced as of March 23, 1982) and own investigation/prosecution of his own charges of wrongdoing within and between Louisiana's Department of State Civil Service (DCS) and Louisiana's Public Health Agency (DHHR-OHSEQ). There is

* Resubmitted to this Court

potential monetary relief in the form of adjustments in salary (and it follows retirement benefits) in the amount (of not less than $100 per month) depending upon what period of wrongful deprivation (11-78 or 11-82 to 8-84) is ultimately considered. Note: Any Federal Court ruling favorable to the plaintiff/ appellant would significantly contribute to the success of the above-mentioned consolidated State Civil Service appeals which were initially based on the following two State Civil Service Rules:

> Civil Service Rule 13.10(c): An appeal may be made to this Commission by:
>
> > Any person in the classified service who alleges that he has been deprived of any right, discriminated against, or adversely affected by the violation of any provision of the Article or any Rule of the Commission. (Underlines mine.)

Civil Service Rule 14.1(j)
Prohibited Activities:

> No person shall make any false statement, certificate, mark, rating, form or report with regard to any application, test, certification, personnel transaction, appointment, or employment made under any provisions of the Department of Civil Service, or in any manner commit or attempt to commit any fraud preventing the impartial execution of the Article Rules and Regulations. (Underlines mine.)

Thus, all Federal/State litigation is highly relevant.

Hence, for instance, if either or both the Federal Court and the Louisiana Supreme Court rule that the title change personnel mechanism as cleverly misused by Louisiana's State Civil Service is declared discriminatory/unconstitutional and/or that the white out/altering/injuring of a public document, namely the plaintiff/appellant's job

description is purely illegal for many, including criminals, reasons, then the above-mentioned relevant monetary relief is assured. (Please note: Since the Louisiana State Supreme Court's decision, whether favorable or not, is of utmost value, hopefully, the Federal Court will allow that court to decide first.)

2) A second very potential source of legal monetary relief for the plaintiff/appellant is his, again very relevant, lawsuit still pending, despite a court-ordered change of venue, at Louisiana's Orleans District Court, No. 86-1800-J (copy attached) against Mr. Robert Boland, the Chief Attorney for Louisiana's State Civil Service. This action, which had been commenced/ filed on October 3, 1986, some 14 days

before a brief was filed on October 17, 1986 at the U.S. Court of Appeals, Fifth Circuit, prays for declarative and injunctive relief as well as a whopping $401,328.88 judgment for monetary damages; indeed, for more money if the plaintiff/appellant's "psychological" pain and suffering continues until his lawsuit "leads to a correction of the wrongs (and) to a continued reformed and supervised (by the Federal Government or another adequate entity) Louisiana State Civil Service."

A PRECEDENT-SETTING ERROR OF EXCEPTIONAL PUBLIC IMPORTANCE:

Because, believe it or not, Mr. Boland failed to respond to the above-mentioned complaint (as he failed to respond to the brief of October 17, 1986, to the U.S. Court of Appeals,

Fifth Circuit), the perhaps soon-to-be-richer plaintiff/appellant will then with more credibility as to his primary motives in this litigation, demonstrate his foremost desired redress, as he continues his fight for the reform of our Civil Service/Merit Systems which are the backbone of modern government--a fight against a clear and present danger to the quality performance of government in Louisiana and perhaps elsewhere as spelled out in:

First, a newspaper article (Note: The attached copy* is offered for the very first time as information) from Baton Rouge, Louisiana's Morning Advocate dated February 6, 1985, which reflected an unsolicited newspaper man's on target perception of the crux of the

problem, namely the misuse, for the purposes of patronage, of the title change personnel mechanism to "grandfather" unqualified but favored persons into a higher classification, pay, and position of authority, which the plaintiff/appellant/whistleblower/investigator/prosecutor, obviously presented during his trial on February 5, 1985, before the Louisiana State Civil Service Commission--of which it was later discovered allegedly had one or more of its members as direct participants in the alleged governmental wrongdoing. Indeed, it was this testimony and discovery that led to the discovery of Louisiana State Civil Service's clever misuse of its title change personnel mechanism whereby it practices its unique discriminatory

favoritism by treating both the favored and the disfavored employee the same rather than differently (in the traditional way)--all of which led to Federal litigation.

The above-mentioned "clear and present danger" to government is, in Louisiana, namely State Civil Service's own subtle involvement, contrary to the Civil Service mission, in patronage for whatever reason. The plaintiff/appellant spelled out this danger in his Writ of Certiorari-Brief dated June 4, 1987, to the Louisiana Supreme Court, as per the following verbatim quotation:

> It has been widely, perhaps nationally, suspected that in many states, if not federal, Civil Service systems, favored but often otherwise unqualified/incompetent persons/employees are somehow

> uncompetitively but successfully promoted/appointed by simply being "grandfathered" or "blanketed" into positions with higher authority/classification/pay; no doubt leaving qualified honest and fairminded employees victimized, bewildered, unprotected, and along with the government, adversely affected. This still successful but highly blundered case involving the favored Ms. Sylvia Sterne and the disfavored appellant/applicant fits well into that mold with the words "TITLE CHANGED" supplanting "grandfathered" and "blanketed." But the seeds of reform may well be in the deliberately detailed records now before the courts of the State of Louisiana and the United States.
>
> (Page 16 of the Writ of Certiorari-Brief to the Louisiana Supreme Court.)

REASONS AGAINST PRIOR DISCLOSURE

It needs to be understood that the plaintiff/appellant, his associates, and other concerned persons heretofore have been (even now as then in February, 1982) reluctant to proclaim the above-cited danger to the public because of their uncomfortable position between those who wish to legislate, in Louisiana, the abolishment of our Civil Service/Merit System and those who worship our present system as though it were above and beyond error and wrongdoing. Indeed, a class action suit by other current/retired Louisiana classified State emloyees similarly adversely affected by the fraudulent title change personnel mechanism is quite likely if certain newspapermen and others no longer cooperate. Perhaps, if

desired by all, a quiet reform of Louisiana's State Civil Service, now that its wrongful ways are exposed, could be effected by court-sponsored negotiation and supervision, especially if the plaintiff/appellant and others cooperate with expeditionary concessions.

CLARIFICATIONS OF 42 USC 1983s VERY SPECIAL LEGAL BENEFITS:

It is suggested that the U.S. Court of Appeals, Fifth Circuit, like the District Court, has ignored the basic legal standings of this case, namely 42 USC 1981 and 1983, the latter of which has, because it relates to State governmental wrongdoing, special legal benefits which seem to have been tailor made for the plaintiff/appellant's case because, as per the quotations below

from Mr. Antineau's book (cited in the Brief of October 17, 1986), it provides him, in particular, with much easier access to the courts emphasizing equitable, indeed, even "hurt feelings," outrage, etc., over monetary injury/relief and judges with much more difficulty in their dismissal of cases and much, much more as noted:

> The right of access to the courts is protected by the Fifth and Fourteenth Amendments due process clauses and 1983 actions are available against persons acting under "color of law" who deny or infringe this right (p. 241). (Louisiana's Attorney General's Office should take note of this quote.)
>
> Action of State and local officers and employees is engaged in under "color of state law" if they are clothed with authority of the state and are purporting to act thereunder, even if the conduct is proscribed by state law (such as Louisiana Law

R.S. 13.5108.1 A, B, C, D, and E). (p. 104)

Section 1983 actions can be used to attack not only employment discrimination based on race, but also on any invidious discrimination (p. 326).

....in 1974, the Supreme Court held that the Eleventh Amendment bars actions against state officials for monetary damages when the awards will have to be paid out of a State treasury....some courts have allowed damages against state officials only in their individual capacities. The Eleventh Amendment does not bar federal court suits against state officers or agencies for declarative and injunctive relief (pp. 357-358).

Comment: Recovery for monetary damages in Louisiana under 1981 and 1983 has been made quite difficult by the Louisiana Attorney General's Office continued defense, in Federal litigation, of the defendants, presumably in compliance with Louisiana

law R.S. 13:5108.1 A, B, C, AND D, which in part reads:

> A. ...monetary damages arising...pursuant to the provisions of Sections 1981 through 1983 of Title 42 of the United Sttes Code by reason of alleged negligence or other act by an officer or employee, provided that such officer or employee at the time damages were sustained was acting in the discharge of his duties...and that such damages did not result from the intentional wrongful act or gross negligence of such officer or employee (as could be proven if the merits are heard in court).
> B. Within five days of the time the officer or employee is served...he shall deliver the...copy thereof to the attorney general. Upon such delivery, the attorney general shall assume control of the defense of such officer or employee, unless it shall appear that the officer or employee was acting outside of the scope of his employment. (Note: Mr. Boland chose not to deliver the copy and the Attorney General has apparently replaced him as the defense Counsel for the

Chairman of the Commission. Apparently, the Attorney General's investigation found nothing wrong--but no state provided attorney under equal protection of the law has attempted to find out if the plaintiff/appellant's charges are right.

C. Should an officer or employee of the state be held liable for monetary damages...the legislature shall appropriate a sum sufficient to reimburse the officer or employee.

Comment: For the plaintiff/appellant, this is a Catch-22 situation: The Federal Court requires redressible monetary damages in order to provide standing while even 42 USC 1983 makes monetary damages from federal litigation not redressible because in Louisiana, the State Treasury will pay. Possible answer: This court should consider redressible, under 42 USC 1983, equitable injury/relief, provide

constitutional standing, consider constitutional challenges and remand the case to District Court for hearing of the case's merits.

> Section 1983 applies only to persons acting under 'color of state or territorial law' and has no application to actions against the federal government, agencies, or persons acting under 'color of federal law.' (p. 178)

Comment: Ms. Horner, the Director of the Federal Office of Personnel Management is sued not on the basis of 42 USC 1983 but on the failure, perhaps because of Presidential Executive Order, to enforce Congressional intent/law to strengthen State Civil Service/Merit Systems so as to protect the employee's constitutional rights, etc., which, if violated, is a redressible non-economic, equitable injury.

In a 1983 action, the allegations of the complaint and the inference to be drawn therefrom, upon a motion to dismiss, must be taken most favorably to the plaintiffs. The Supreme Court has indicated that a motion to dismiss in a 1983 action is not to be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The rule is generally followed (p. 386).

In 1983, actions all necessary allegations pleaded must be proved by a preponderance of the evidence (p. 382).

There is no need to exhaust state judicial remedies before bringing a 1983 action in Federal Court (p. 393).

*Res judicata is never a barrier to 1983 action which is based even in part upon facts that were not in existence at the time of earlier litigation in either Federal or State Courts. (The plaintiff/appellant learned of the Louisiana State Civil Service Commission's participation in the alleged conspiracies after February 5,

1985--years after his initial appeal, on March 23, 1982, to the Commission.) (p. 399)

....A...commissioner has been subject to suit under this section. (p. 213)

A federal court has held that since a local Civil Service Commission was not competent to resolve claims...a hearing before such a commission was not res judicata when an action was brought in court under 1981. (p. 398)

Courts have recognized in many 1983 actions that a plaintiff, by introducing a sufficient quantum of evidence varying with the cause of action, can establish a prima facie case which will enable him to prevail unless the defendant then comes forward (which DCS Attorney Boland and others have not done) and establishes a persuasive defense. (p. 390)

A federal court, in certain extraordinary and limited circumstances, may postpone its decision in order to avoid premature and perhaps unnecessary decision of a serious federal question or to avoid the hazard of unsettling some delicate balance in the

area of state-federal relations. (p. 392)

A person has a right to be free from arbitrary denial of an opportunity to qualify for a public post. (p. 316)

If a public employee has either a 'property' or 'liberty' interest in his job (as Judge Livaudais has ruled), he is constitutionally entitled to (substantive) and procedural due process....A public employee's liberty is affected where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. (p. 319)

Public employees with either a property or liberty interest at stake can utilize 1983 actions when being subjected to suspensions, layoffs, demotions, or other discipline short of removal, without procedural due process of law owing to them under the Fourteenth Amendment. (p. 321)

It is proper for a person adversely affected to bring an action under 42 USC 1983 on the grounds that he has been denied his rights under the

> equal protection clause of the Constitution. Any form of invidious or unconstitutional discrimination against the plaintiff or his class by a defendant action under 'color of law' can be attacked in a 1983 action. (p. 324)

In the case of United States ex rel Motley v. Rundle (1972, ED Pa) 340F Supp.807, 810-811, Mr. Antineau noted that "....regardless of whether actual damages have been proved." A federal court states:

> Whether or not actual compensatory damage is present, a plaintiff in an action under 42 USC 1983 may also recover nominal damages because the constitutional rights of a citizen are so valuable to him that an injury is presumed to flow from the deprivation itself. In most cases when a public official denies rights that the citizen felt secure under our Constitution, the result is hurt feelings, outrage, embarrassment, or humiliation and nominal damages may be awarded for those natural consequences of lawless action by state officials. (p. 353)

Comment: Apparently under 42 USC 1983, even "psychological consequence presumably provided by observation of conduct with which one disagrees" IS "a sufficient personal injury for constitutional standing purposes."

> The mootness doctrine does not prevent a 1983 action for the constitutional impairment of a federal right, even though that impairment has ceased, when collateral disadvantages can flow from the denial of the civil right. (pp. 412-413)
>
> Conspiracy claims...can be brought under 1983, so long as at least one of the conspirators has acted under 'color of law.' (p. 95)

ARGUMENTS/CONCLUSIONS

It may be argued/concluded from the above that:

A. The six substantive constitutional challenges present, alongside of the case itself, justiciable constitutional controversies for a Federal Art. III Court.

B. The plaintiff/appellant has constitutional standing and is therefore a legally proper person to sue for/to request constitutionally redressible relief, both equitable and monetary, because he has presented far more than sufficient constitutionally redressible, "cognizable," as well as "distinct and palpable" personal injuries causally and directly connected, as per a "quantum" of specific evidence dually reflecting both preponderance and malicious

intent,* to fully clothed with "color of law" Louisiana State officials/ employee's wrongdoing, which if not corrected would establish a dangerous "precedent-setting error of exceptional public importance"; the plaintiff/ appellant has vigorously commenced and persistently requested/pursued, for years, constitutionally redressible relief in which he continues to have a personal stake and certainly "live" interest (like the Orr v. Orr case) in the outcome of current relevant litigation in two Louisiana State Courts which will consider not only the constitutionality/legality of certain state governmental conduct, but also

* As a direct victim of malicious abuse of due process to accomplish unlawful purposes.

requests for monetary relief as follows:

a) For monetary damages in the form of loss of property, namely salaried (and retirement) income--which is more of a legal status than had Mr. Orr in the Orr v. Orr case in which his nationally important constitutional challenge in Federal Court may possibly have provided his (and the plaintiff/appellant's) "only promise" for relief (440 USC 273).

b) For, and foremost, equitable relief from such injuries as, in part, "invidious discrimination," violation of laws and State Civil Service rules in order to cover up conspiracies (which hardly contribute to constitutional due process), denial of various constitutionally and legally protectible rights and adversely

affected professional and State Civil Service careers and his otherwise acclaimed reputation as a Chief Public Health Planner (a fact to this day still denied despite a preponderance of evidence), as well as the specific illegal denial, since November 1978 (which began to whole pursuit of equitable justice and monetary adjustment) of an opportunity to qualify/compete for the still abandoned "public post" variously identified as: DHHR-OHSEQ's Community Planning Program Coordinator, position #1155-001/Planning Analyst VI/Director of DHHR-OHSEQ's Policy, Planning and Evaluation section.

The seemingly endless list of inequities would also include still successful victimization of the

plaintiff/appellant in favor of another employee by means of blatant conspiracies, collusion, fraud, falsification and concealment, unlawful injury of official public records and outright perjury. (This list could to on and on..but the bottom line is that the Federal Office of Personnel Management's ruling calling for the State Civil Service's "self-certification" or self-regulation failed to enforce congressional intent-legislation to protect this former employee in a State Civil Service.

Finally, towards constitutional redressible relief, the Art. III Federal Court(s) must address and abide by the special legal benefits afforded by 42 USC 1983 with respect, at least, to access to a Federal Court, dismissal of

claims, res judicata, even "psychological" injury. The court, in particular, should consider that an offer by the State to pay monetary damages makes that relief hardly redressible in this case unless it were for a more fantastic, unpayable amount than four million dollars. Nonetheless, since Federal litigation is still alive, I hereby, if legally possible, reclaim one (1) dollar or more monetary damages in this Federal litigation plus equitable relief.

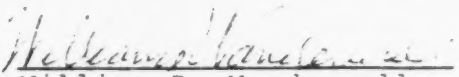
C. The ARt. III Federal Court(s) because of the above outlined justifications, are therefore rightfully and legally empowered with U.S. Constitutional jurisdiction to consider, decide, and so resolve the already-presented six substantive

constitutional challenges, any one of which just might cause success in state litigation, as well as impact the quality of governmental performance not only in Louisiana but also throughout this nation.

Therefore, it is again prayed that the U.S. Court of Appeals, Fifth Circuit, rule on the constitutional questions and remand the case to the District Court so that the plaintiff/appellant may (this time in a necessarily less defensive setting than when he prosecuted before the Louisiana State Civil Service Commission) obtain answers to important questions--or stay all its proceedings until state litigation is finalized. During this stay, it was suggested that the Court through the appointment of a (perhaps

volunteer) Special Master could quietly test the merit of Louisiana's State Civil Service Self Regulation with the premise that self reform could be the better part of it.

Respectfully,



William R. Vanderwall
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(504) 486-4672

I hereby certify that on this 22nd day of July, 1987, a copy of this Petition for Panel Rehearing and attachments have been sent via U.S. Mail with proper postage to the correct addresses of the parties noted on the top page of this Petition.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86 3617

WILLIAM R. VANDERWALL
Plaintiff-Appellant,

versus

CONSTANCE HORNER, ET AL.,
Defendants-Appellees.

Appeal from the United States District
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(August 10, 1987)

Before REAVLEY, JOHNSON AND DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

"Denied"

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX F

STATE OF LOUISIANA
DEPARTMENT OF CIVIL SERVICE
BATON ROUGE, LOUISIANA

AUTHORIZATION TO MAKE
CHANGE IN CLASSIFICATION
AND/OR PAY PLAN PENDING
FINAL APPROVAL BY THE
CIVIL SERVICE COMMISSION

"4-7-81"
EFFECTIVE DATE

CLASS TITLE: Community Planning Program Coordinator

CLASS CODE: 1155

SALARY RANGE: $1542 - 2209

TENTATIVE APPROVAL REQUESTED

APPROVED "Hamner"
DIRECTOR

"8-1-80"
DATE

RECOMMENDED:

"Frank V. Reitzel"
CHIEF OF CLASSIFICATION

"8-1-80"
Date

APPENDIX F